United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

66

IN THE

UNITED STATES COURT OF APPEALS FOR

THE DISTRICT OF

COLUMBIA

Appeal No. 24, 212

UNITED STATES OF AMERICA,

Appellee,

VIRGIL R. MINOR,

Appellant.

Appeal from the United States District Court
for the District of Columbia Circuit

BRIEF FOR APPELLANT

Submitted by,

R Kenneth Mundy
Attorney for Appellant

I N D E X

Statement of Questions

1. Was the trial court correct, on the basis of the record before it, in finding that the Government sustained its burden by clear and convincing evidence that the in-court identification proceeded from a source independent of the prior illegal confrontation?

2. Did the Government sustain its evidentiary burden on the ultimate issues of guilt or is reversal required by the fact that on the evidence a reasonable mind must necessarily have a reasonable doubt as to guilt?

Jurisdictional Statement

This Court's jurisdiction is involved under 28 U.S. C. 1291.

Statutes Involved

a) §22-1301

Whoever shall, either in the night or in the day time, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

b) §22-2901

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

c) §22-501

Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or willfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not more than fifteen years.

Reference to Court's Ruling Wherein Error Claimed

a) Permitting in-court identification (Question 1).

b) Denial of motion for Directed Verdict of Acquital. (Question 2)

This case has not previously been before this Court.

Table of Authorities

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* Cases chiefly relied upon

Statement of Facts

On January 18, 1969, at approximately 2:00 A.M., Bernice Scott was allegedly the victim of a burglary robbery, and assault with intent to commit rape by a Negro male who had gained access to her apartment at 1306 -23rd Street, S. E. in the District of Columbia. Over two hours later, the defendant Virgil R. Minor, was arrested at his home, completely across town, at 4340 Gault Place, N.E. in the District of Columbia by Detective F. E. Baker, Jr. and V. C. Hopkins of the Metropolitan Police Department accompanied by Miss Scott and Melvin Buchanan. The defendant's name and address had been supplied to the complainant and the police by said Melvin Buchanan, the complainant's nephew, who used the name "Ronald Knotts." Said Melvin Buchanan was neither in and about the premises of the assault nor witnessed it.

Right after the alleged assault, Mrs. Scott telephoned her nephew to report the incident and as a result of this conversation, she determined that the defendant was the assailant. The actual process of this determination is ambiguous. In her telephone conversation with Melvin Buchanan, Mrs. Scott had merely referred to her assailant as "that boy." It appears that at no time did Mrs. Scott even attempt to describe her assailant to either the police or to her nephew. Apparently, from about 8:30 P.M., January 17, 1969, the preceding night, to

1:00 A.M., January 18, 1969, an hour before the crime, Bernice Scott had been at a drinking party in Melvin Buchanan's home, where several "boys" (at least three and perhaps seven) had been present. Included there was the defendant, Virgil Minor. Mrs. Scott testified that she had no recollection of ever having seen or met the defendant prior to the evening of January 17, 1969, at Melvin's party.

Having arrived at the defendant's home with Melvin Buchanan and Mrs. Scott, the police directed the defendant, who had been asleep in his bedroom, to dress in the same clothing he had worn earlier that evening. The defendant was escorted into his dimly-lit living room where he was confronted by the complainant, her nephew Melvin Buchanan, and the police officers. After brief consultation with her nephew, Mrs. Scott identified not the defendant but rather the clothing as being that worn by her assailant (transcript p. 48). The defendant was not represented by counsel at the above confrontation, and his arrest was immediately subsequent. The trial court excluded reference by the Government to what transpired at the defendant's house when he was confronted by the complaining witness without being in a line-up. However, the court did permit the in-court identification by Mrs. Scott of the defendant.

An in-court identification of Defendant by Mrs. Scott as her assailant was permitted in spite of compounded equivocation and inaccuracy on the part of the complainant in her identification of the defendant, casting doubt upon the very likelihood of the act having occurred at all.

Testimony of F.B.I. examination of the "face mask" (woman's hosiery) used by the assailant and reasonable explanation for fingerprints of the defendant found on certain possessions of the complainant made unreasonable the jury's determination of guilt of the Defendant.

Argument

According to Clemons v. U.S., 40[illegible] F. 2d 1230, which examines the due process requirements in pre-trial identification, if the pre-trial identification is "unnecessarily suggestive," and thereby violative of due process, it becomes incumbent upon the Government to establish by "clear and convincing" evidence that the in-court identification has an "independent source " for reliance. Hence, the consequences of a Wade-Gilbert (388 U.S. at 240-41 and 383 U.S. 272-79) violation are two-fold. The Government may not introduce the illegal pre-trial identification against the accused. Nor may the Government initiate an in-court identification unless it establishes by clear and convincing evidence that the in-court identification proceeded from a source independent of the prior illegal confrontation. As the court

in Hawkins v. United States, 420 F. 2d 1306 (1969) affirms, this requires considerably more than a showing that the observation provided ample foundation upon which the witness, absent the illegal confrontation, could make an identification. (Clemons). What is required is a demonstration that the in-court identification proceeded from an independent source, and for a determination of that source, Wade provides a partial check-list of the factors to be considered:

> "the prior opportunity to observe the alleged criminal act; the existence of any discrepancy between any pre-lineup description and the defendant's actual description; and identification prior to lineup of another person ....."

Clemons, too, provides meaningful factors for establishing an independent source:

1. opportunity to view
2. ability of witness to describe

The Court below, having determined that the early morning confrontation between the complainant and the defendant was violative of his Sixth Amendment right to counsel pursuant to Wade, nevertheless permitted an in-court identification. The inference is clear that in so ruling the court had determined that the in-court identification had an independent source. The defendant respectfully submits that in this determination the court erred.

With reference to the above-provided criteria used to determine independent source, the complaining witness' testimony at trial (Tr. 5-41 and Tr. 39-135 principally) seems to disprove or negate rather than to substantiate an independent source. The complainant testified that to the best of her recollection she had never seen or met the defendant prior to the evening of January 17. At that time, both Mrs. Scott and defendant were among the guests at a party given by Melvin Buchanan at the latter's apartment. Mrs. Scott was the only female in attendance. Including the host and the defendant, there were five or six young men present. Considerable indulgence in alcoholic beverages took place. The complainant had at least three or four drinks and admittedly became "high." She engaged in conversation and dance with the others and testified in effect to no singular memory of the Defendant as she had had no prolonged conversation with the defendant and had danced with him only once, briefly Prior to the alleged assault, complainant's opportunity to view the defendant was thus limited to the time she spent in the half light imbibing and cavorting at the party described.

Complainant also testified that her assailant was fully masked in a woman's stocking when she first became aware of his presence atop her person. The complainant was soundly and deeply asleep when the attack commenced,

for by her own admission, she was not responsive for at least several minutes after it was underway. Presumably somnolent, half-conscious, startled, and oblivious from her sleep and drinking, she struggeled with her assailant briefly, her only thought or concern to lead him from her apartment. In this she succeeded, after only a minute or two. The defendant respectfully contends that because the complainant's opportunity to view, at both the party and during the assault, were characterized by disorganized thought and confusion, the proffered identification could not conceivably contain the validity and reliability to which the Government attaches significance and which is required by the criterion used to determine independent source pursuant to Wade and Clemons.

The transcript of proceedings nowhere reveals an endeavor by the complainant to describe with any degree of detail her assailant, either to the police or to her nephew before the nocturnal visit to defendant's house several hours later. Moreover, the complainant's testimony does indicate grave difference and discrepancy between her description of the assailant and the actual physical characteristics of the defendant. In short, the complainant's ability to describe is overwhelmingly suspect and the description she gave of her assailant at the trial is as unlike the Defendant as night is disparate with day. Most revealing are the glaring inaccuracies.

In fact, the defendant is considerably in excess of six feet in height (Six feet two inches to be exact) and weighs more than 170 pounds (Tr. 230). The complainant testified, at p. 37, that her assailant was "small... A little taller than me." (Complainant is, in fact, barely five feet in height (Tr. 36). Even the Court in the Pre-Trial motions hearing was struck by complainant's short stature (Tr. 36). At the preliminary hearing, complainant described her assailant as having worn a T-Shirt and dark pants. Complainant had told the arresting officers that her assailant was wearing either a tan or brown sweater or shirt and dark trousers, and to this she testified at trial (at p. 70). She made no mention whatever of a black coat or white scarf. In fact, defendant testified that he was wearing blue slacks and a gold shirt at the party. When he left the party, defendant testified that he was wearing a black cashmere overcoat and a white scarf. This was corroborated by a witness who had observed the defendant after his departure from Melvin Buchanan's party (at p. 142) and by the complainant's nephew Melvin Buchanan (at p. 155).

The complainant's opportunity to view either the defendant or her assailant was seriously limited and under circumstances which make a significant or reliable description or identification impossible. In addition, the ability of the witness to describe her assailant, as marked

by inconsistency, inaccuracy, and contradiction, is so suspect that the criteria announced in Wade, and the test of clear and convincing establishment of independent source recited in Clemons, have not been met or complied with here. Unlike the complainant in U.S. v. Terry, 422 F. 2d 704, the complainant in this case did not have an ample or propitious opportunity to observe her assailant; nor did the complainant in this case give to the police an initial description which matched the defendant's physical characteristics. The vital importance of the complainant's identification of her assailant in the type of offenses charged is beyond dispute. Protective and rigid standards cannot and must not be relaxed. "Although the positiveness of a witness about an independent base for an in-court identification is a relevant factor, it is to be weighed warily ...." Clemons v. United States, 408 F. 2d 1230, 1242. With that admonition in mind, and in view of the presumption that an "in-court identification is the product of a /prior improper identification/" , Mason v. United States, _____ U. S. App. D. C. _____, F. 2d _____ (June 30, 1969), defendant respectfully submits that the Government has failed to establish by clear and convincing evidence the requisite independent source and that the in-court identification was impermissably based if indeed founded at all, and impermissably influenced by the illegal confrontation disallowed by the court below.

Finally, upon the evidence amassed by both sides below, a reasonable mind must necessarily have a reasonable doubt as to defendant's guilt. In Taylor v. United States, 414 F. 2d 1142 (1969), the court, in applying Chapman v. California, 386 U.S. 18, determined that: "we must look to all the evidence, defense and prosecution alike, and bring our judgment to bear upon the question of whether it is clear to us beyond a reasonable doubt that a guilty verdict would have resulted even if the jury had never heard the challenged testimony." Given the illegal confrontation in this case, and assuming questionable, if any, independent source, the Chapman test,"one not easily passed," was not complied with in this case. The evidence of guilt is not so compelling as to even allow this Court on appeal to find harmless error. Indeed, the evidence militates to the contrary.

In support of this, we refer again to the inaccuracies, ambiguities, and inconsistencies cited herein earlier with reference to the complainant's ability to describe or to identify the defendant as her assailant. These alone would preclude as a matter of law the verdict reached by the jury. But causing even greater imbalance we submit are the weighty considerations that reasonable minds could only accept as exonerating the defendant. We refer now to the scientific testimony received in evidence from the F.B.I. Agent Scholberg, to the effect that the

stocking mask used by Mrs. Scott's assailant had no "head hairs" belonging to the defendant but rather contained "head hairs" of another unidentified individual. The evidence thus received lends further support to defendant's contention that the Jury could not have found beyond a reasonable doubt that the defendant was Mrs. Scott's assailant. Apparently, no consideration was given to the testimony that the defendant and the complainant were coincidentally in attendance at a party earlier in date to the one on the night of the alleged crime; And that on that occassion Mrs. Scott had in her possession and was utilizing, boxes of film identical to the ones on which defendant's fingerprints were found (Tr. 356). Then the conclusion that defendant must necessarily have come into contact with these boxes of film at the time of the alleged assault does not necessarily follow nor is by any means inescapable. In fact, the fingerprint evidence, considered in this more realistic perspective, and the inability of the complainant to consistently describe the defendant as her assailant weigh strongly in favor of the defendant's contention that reversal is required by the fact that on the evidence a reasonable mind must necessarily have a reasonable doubt as to guilt.

Conclusion

For the reasons cited, the judgment of conviction should be reversed by this Court.

Respectfully submitted,

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

III

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether the trial court properly denied appellant's motion to suppress the in-court identification testimony?

2. Whether the trial court properly denied appellant's motion for judgment of acquittal?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,212

UNITED STATES OF AMERICA, APPELLEE

v.

VIRGIL MINOR, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a three-count indictment filed February 25, 1969, appellant was charged with burglary in the first degree (22 D.C. Code § 1801), assault with intent to commit rape (22 D.C. Code § 501), and robbery (22 D.C. Code § 2901). Trial was held on September 22, 23 and 24, 1969, before the Honorable Oliver Gasch, sitting with a jury, and appellant was found guilty on all three counts. On April 1, 1970, appellant was sentenced to eight years' incarceration pursuant to the provisions of the Federal

Youth Corrections Act (18 U.S.C. § 5010(c)). This appeal followed.

Pre-trial Hearing

At the pre-trial identification hearing held on the date of trial, the prosecutrix, Mrs. Bernice Scott, testified that on January 17, 1969, at about 8:30 or 8:45 p.m. she went to a party at the apartment of her nephew, Melvin Buchanan (Tr. 7, 19).[1] There were six people at the apartment when she arrived, but three soon departed leaving appellant, his brother, Melvin Buchanan, and Mrs. Scott. Melvin Buchanan then hurried off to the liquor store, which would close at 9:00 p.m. (Tr. 19), and upon his return the party commenced. Drinks were consumed, and music blared from the record player (Tr. 35).[2] Eventually, appellant asked Mrs. Scott to dance, and she obliged (Tr. 35).[3] During the remainder of the party she engaged in conversation back and forth with appellant concerning "little things" (Tr. 35). While Mrs. Scott testified that she might have met appellant at a previous party, this was the first time that she "got to know him to look in his face and recognize him" (Tr. 9). Mrs. Scott further testified that during the party all the lights in her nephew's apartment were on (Tr. 19).

At about 12:30 a.m. Mrs. Scott decided to leave the others at the party and return to her apartment, which was right around the corner (Tr. 19-20). After arriving at her apartment and locking the door, she relaxed by taking her clothes off, making a sandwich and turning on the television to watch the end of the late show (Tr.

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[1] The party was being held in the living room of her nephew's one-bedroom apartment (Tr. 34-35).

[2] While Mrs. Scott and her nephew were drinking, she was not sure if appellant had consumed any liquor (Tr. 7).

[3] Bernice Scott stated that she danced with appellant twice, but at another point she testified that she danced with him only once (Tr. 10, 19).

20). At that time she heard a "knock." Instead of opening the door, however, she hastened to her bathroom window, and "peeping out" she observed appellant going past the window and around the corner. Appellant returned a second time, knocked on the door and again was recognized by the complainant (Tr. 8, 20-22).[4] Soon thereafter Mrs. Scott fell asleep on her sofa but was awakened about an hour later when she realized there was a man lying on top of her trying to "fondle" her (Tr. 40).[5] Crying and hollering, she was struck by the assailant and ordered to "shut up" (Tr. 40). While he held Mrs. Scott down on the sofa, she fought him, trying desperately to get the intruder off her body. She was understandably afraid (Tr. 9, 40). The two wrestled for almost twenty minutes until finally she got a chance to look upward at her assailant, whereupon she recognized his attire as the same clothing worn by the guest at her nephew's party (Tr. 8). In addition, however, the intruder had a stocking pulled over his head down to his mouth (Tr. 8). His effort to conceal his features nevertheless was unavailing, for Mrs. Scott, with the aid of a light by the sofa, could see through the thin stocking. When she exclaimed, "I recognize you, I know who you are," the now-startled invader jumped up, snatched the stocking off his head and pleaded, "Bernice, please don't tell anybody" (Tr. 9, 24). Mrs. Scott, still afraid, tried to get him out of her apartment as quickly as possible. She put the kitchen light on and walked him to the door, amidst his continuous pleas not to tell anyone. Appellant was only a few paces behind Mrs. Scott, walking towards her as she led him to the door. Consequently, with the aid of the kitchen light she had an opportunity to look directly at his face (Tr. 24).

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[4] This identification of appellant rests on Mrs. Scott's recognition of the stranger's clothing (tan shirt, dark pants) as the same clothing worn by appellant at the party.

[5] She estimated that the assault occurred between 1:30 and 2:00 a.m. (Tr. 7).

Successful in ejecting the intruder from her abode, she immediately telephoned her nephew and told him that "that boy" had come back to her apartment. She also related to her nephew what appellant had done to her (Tr. 22). Melvin Buchanan informed her that the culprit's name was Ronald Knotts and advised her to call the police at once, which she did.[6] In addition to giving a clothing description to the police, she described her assailant as being a little taller than herself, having dark brown skin, wearing a bush and being around twenty years old (Tr. 36-37).[7] At approximately 3:00 a.m. Mrs. Scott, Melvin Buchanan and two detectives, including Detective Francis E. Baker, Jr., proceeded to appellant's home, his address having been supplied by Buchanan (Tr. 23). While Mrs. Scott stood on the first landing of the stairway where the lighting conditions were good, the detective went upstairs and shortly returned with appellant, the latter dressed in a tan shirt and dark trousers (Tr. 12). When asked by the detective whether this was the person, she responded, "Positively" (Tr. 13). Mrs. Scott then turned to her nephew and told him she was sure this was her assailant (Tr. 12-13).

When asked by the court for the basis on which she was making her identification of the defendant, Mrs. Scott stated:

> The same face he has now is the same one I saw when he was on top of me . . . (Tr. 38).

She remarked further:

> The reason a person on top of you and as afraid as I was you would never mistake anybody else as close to you. You are frightened too and his face is going to stand out in your mind. That is one thing

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[6] Melvin Buchanan knew it was Ronald Knotts because Knotts had just previously advised him that he was going to visit his aunt (Tr. 34).

[7] She testified that she was 5'1" (Tr. 36). At trial she stated she was possibly 5'1½" (Tr. 102).

> you try to do is recognize a person when something like that happens . . . (Tr. 39-40).

Even if she had not seen appellant at his house with the police, Mrs. Scott declared, she still could identify him (Tr. 39).

Detective Baker testified that shortly after 3:00 a.m. on January 18 he arrived at the complainant's apartment. She related to him the events of the early morning hours, including the fact that she had recognized her assailant as Ronald Knotts, a person she had seen at a party earlier in the evening (Tr. 41-42). She described the intruder as a Negro male in his twenties, wearing a gold or tan sweater and dark pants (Tr. 43). At approximately 4:05 a.m. Detective Baker, his partner, Mrs. Scott and Melvin Buchanan proceeded to the suspect's house (Tr. 46-48). Detective Baker found appellant upstairs in bed wearing a pair of dark pants. After placing him under arrest and ascertaining that appellant's true name was Virgil Minor, appellant was advised to put on the sweater shirt he was wearing earlier and come downstairs (Tr. 47). Once downstairs, he was positively identified by Mrs. Scott as her assailant (Tr. 49, 51).

The court held inadmissible the pre-trial identification of appellant at his home but ruled that an in-court identification by the complainant would be allowed (Tr. 56). The trial judge reasoned that while the one-man showup was not sufficiently contemporaneous, her testimony revealed by clear and convincing evidence that her ability to identify appellant in court was predicated to a large degree upon what she had observed at both her nephew's apartment and her own apartment (Tr. 53, 56).

Trial

(A) *The Government's Case*

After substantially repeating her earlier testimony concerning the events at her nephew's party, the unexpected knocking at her door, and the identity of the male figure in the tan shirt and dark pants seen running past her

bathroom window (Tr. 76-77, 82, 105-109), Bernice Scott made an in-court identification of appellant (Tr. 81, 135).[8] She then proceeded to describe the events which culminated in the sexual assault. In addition to the facts that were brought out at the pre-trial hearing, Mrs. Scott testified that she was awakened by a man on top of her, fondling her body and attempting to insert his penis into her vagina.[9] Mrs. Scott struggled and wrestled with the attacker on the couch for almost fifteen minutes (Tr. 78, 92, 121). When she finally managed to push her assailant off her body, she observed that he had a stocking over his head and was dressed in a tan shirt and a pair of dark trousers. Mrs. Scott also noticed that while her robe was still partially on her body, her slip was now lying on the floor next to the couch in a torn condition (Tr. 78-79, 91, 93-94). Still on the couch, she looked up at her masked assailant and exclaimed, "I recognize who you are." Her assailant immediately jumped off the couch, snatched the stocking off his face and begged, "Oh Bernice, don't tell anybody" (Tr. 79, 135-136). When asked by the victim how he entered her apartment, he admitted he came in through a window with another person named Tom (Tr. 79, 135-136).[10] Standing up, Mrs. Scott secured the robe around her and led appellant to the door of her apartment, while appellant constantly pleaded with her not to tell anybody what had happened (Tr. 79). At this time the victim closely observed her now docile attacker:

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[8] Additional testimony at trial revealed that after the male figure ran past her window, she called her nephew and advised him to tell "that boy" to stay away. The same individual returned in fifteen or twenty minutes, and again she called her nephew telling him what had occurred (Tr. 82).

[9] While not awakened by appellant's maneuvers in removing her slip, Mrs. Scott stated that she was aroused by his attempts to fondle her privates, by the presence of his body on top of hers, and by his attempts at coitus (Tr. 92, 127).

[10] Mrs. Scott testified that two of her windows in the living room did not lock (Tr. 98).

> His face, his head, his features. I looked right at him when I took him to my door (Tr. 119).

After succeeding in getting the intruder out of her apartment, she immediately called her nephew and then looked around her apartment to see if anything was amiss. Upon inspection she found that almost $13 was missing from her wallet and also noticed on a chair an unopened box of camera film, which before the attack had been in her bedroom closet for over a year (Tr. 80, 88-89, 272).

Lawrence Cauley testified that on January 17 and 18, 1969, he was living in an apartment next door to Mrs. Scott. Between 11:30 and 1:00 a.m., while entertaining company, he heard a lot of banging on a door in the hallway. Opening his door, he noticed a man dressed in a black topcoat and white scarf knocking on the door to Mrs. Scott's apartment. Mr. Cauley told the man to be quiet or he would call the police. Around fifteen to thirty minutes later this same man returned, and again Mr. Cauley warned him to be quiet. When Mr. Cauley left to take a friend home, the stranger was no longer at the door (Tr. 137-147). Mr. Cauley made an in-court identification of appellant as the man he observed knocking on Bernice Scott's apartment door (Tr. 140).

Melvin Buchanan testified that on the evening of January 17, 1969, he decided to have some friends over to his apartment. Appellant was there too, but he was not formally invited (Tr. 148-149). In addition, there were two or three other men at the party. After his aunt arrived, Melvin Buchanan left for the liquor store to buy some rum (Tr. 164, 171-172). During the party Mr. Buchanan observed his aunt and appellant drinking and remembered seeing his aunt dancing with appellant (Tr. 163, 166, 177). Bernice Scott left the party at about midnight, being the first guest to depart. Mr. Buchanan testified that while she might have been "high" when she left, she did not appear to be drunk (Tr. 165-166).

Shortly thereafter appellant left the party, advising his host that he was going over to see his (Melvin's) aunt.

Before leaving, Mr. Buchanan told appellant that he did not think his aunt wanted to be bothered. In about five to ten minutes appellant returned and then left again (Tr. 149, 177). Mr. Buchanan then received a telephone call from his aunt, who exclaimed that she did not want to be bothered by that fellow knocking on her door (Tr. 151, 174, 176). Appellant returned a second time to the party and was warned by Buchanan to stop knocking on his aunt's door (Tr. 178). Appellant then left a third time and did not return to the party again (Tr. 151).

Twenty minutes later Mr. Buchanan received a second phone call from his aunt reporting what had happened and describing the intruder as "that boy with a bush" (Tr. 159, 173-174).[11] In addition, she advised him that when she had awakened the intruder was on top of her and that he had also taken her money (Tr. 178-179). Realizing who the culprit must have been (Tr. 174), Buchanan called appellant's house, but he was not at home (Tr. 150). Within ten minutes he left for his aunt's apartment (Tr. 151-152). His aunt appeared nervous and excited; the police were already there (Tr. 150).

Detective Baker testified that when he arrived at Mrs. Scott's apartment, she appeared to be upset and angry, and though she seemed to have been drinking, she did not appear intoxicated (Tr. 181, 190). Mrs. Scott explained to Detective Baker that she had fallen asleep on her couch wearing only a slip, and that when she awoke a man was on top of her naked body having sex with her (Tr. 190-191). She described her assailant as a Negro male in his twenties dressed in a tan or brown sweater or shirt and dark trousers. She further stated that even though he had a stocking mask on his face, she recognized him as the same man who had been at her nephew's party earlier that evening (Tr. 185, 188-194). She also informed Detective Baker that $13 was missing

[11] Appellant was the only person at the party with a bush haircut (Tr. 174).

from her wallet (Tr. 193). Upon inspecting the apartment, the detective noticed a torn red slip and two boxes of Kodak film lying in a chair, and a stocking on the floor which appeared torn and stretched out of shape (Tr. 182, 187). On checking the middle window in the living room, Detective Baker found paint chips on the window sill and noticed that the window screen had been raised (Tr. 182, 192).

After obtaining the address of the suspect, Detective Baker proceeded to his house and arrested Virgil Minor, who had been using the nickname of Ronald Knotts. Pictures taken of appellant at police headquarters revealed that he was wearing a long black coat, a white scarf and a gold sweater-type shirt (Tr. 184-188). Appellant's fingerprints were taken (Tr. 196) and later were compared with latent fingerprints found in Mrs. Scott's apartment. An expert witness testified that in his opinion a fingerprint on one of the boxes of film matched that of appellant's right middle finger (Tr. 212, 215, 226, 235). Hair samples were also taken from appellant.

(B) *The Defense Case*

Appellant's first witness was Special Agent Myron T. Scholberg of the F.B.I. Laboratory. After comparing known head hairs of appellant with head hairs removed from the stocking found in Mrs. Scott's apartment, it was his opinion that the head hairs found in the stocking did not come from appellant's head (Tr. 267). However, on cross-examination Agent Scholberg testified that he was not positive in his conclusion. Since head hairs from the same individual may have different characteristics, the agent did not know whether the sample of known hairs of appellant delivered to him was representative of appellant's entire head (Tr. 268-270).

Appellant testified that he arrived at Melvin Buchanan's home at 7:45 p.m. on January 17. Bernice Scott appeared at about 8:45. During the party Mrs. Scott and appellant were drinking rum, and she was flirting

with the men (Tr. 281-282, 287, 310). Appellant recalled dancing twice with Mrs. Scott and also observed her throwing herself at people and dancing "nasty" with the others (Tr. 307-309). He chatted with her, and at one point she told him that he was a young boy and that she liked him (Tr. 295).

Appellant testified further that after Mrs. Scott left the party, Melvin Buchanan asked him to go around to her house and see if she had any liquor since there was none left at the party (Tr. 288-289). In about two minutes he arrived at Mrs. Scott's door, but no one inside responded to his knocks. A man in a neighboring apartment opened his door but said nothing (Tr. 290-291). Appellant went to the bottom of the stairs, came back upstairs and knocked again to no avail, so he then returned to the party (Tr. 291, 313). He told Melvin Buchanan what had happened and was advised by Buchanan that his aunt had called and stated that she did not want to be bothered. Appellant then left the party and went to Joe Page's house a few blocks away (Tr. 291-292). He borrowed $3 from Page,[12] stayed ten or twenty minutes, caught a cab and arrived home at about 3:00 a.m. (Tr. 293-295).[13]

The final defense witness, Harry Sweet, testified that he remembered seeing Bernice Scott at several parties when appellant was present. While she might have had a camera with her at one of the parties, he did not remember whether that was a party which appellant had attended. On cross-examination he stated that he did not remember Bernice Scott having a camera or taking pictures at any of the parties (Tr. 351-357).

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[12] Joe Page did not testify, and a motion for a missing witness instruction was granted (Tr. 344).

[13] Called by the defense, Mrs. Scott denied that she was completely naked when she was on the couch (Tr. 276). Melvin Buchanan was also recalled and denied the allegation by appellant that he had sent appellant to get liquor from his aunt's apartment (Tr. 323).

ARGUMENT

I. The trial court did not err in finding by clear and convincing evidence an independent source for the in-court identification.

(Tr. 7-56)

At the pre-trial hearing, appellant sought to suppress Mrs. Scott's in-court identification on the ground that there was no independent source for that identification. He contends here, as he did in the trial court, that the absence of an independent source is evidenced by Mrs. Scott's poor opportunity to observe her assailant and her failure to give the police a detailed description of her assailant which matched appellant's physical characteristics. By denying appellant's motion the trial court, to the contrary, found "clear and convincing evidence" that Mrs. Scott's opportunities and abilities to observe appellant at her nephew's party and in her own apartment gave an independent basis to her in-court identification (Tr. 51-56).

Clear and convincing evidence of an independent source was abundant. Mrs. Scott testified that she was at her nephew's party for over three hours in appellant's presence. All the lights in her nephew's apartment were on, and all the partygoers remained in the living room. Moreover, she testified that she engaged in conversation with appellant during the party and even danced with him once or twice. Later, when she was home and observed a male figure going past her bathroom window, she recognized the clothing on that man as being the same that appellant was wearing at the party. In addition, during the course of the fifteen- or twenty-minute attack, with the aid of a light next to the sofa she recognized appellant through his thin stocking mask. When he snatched the stocking off his head after realizing he had been recognized by his victim, Mrs. Scott turned on the kitchen light and led him to her apartment door, looking directly at his face. After the police arrived,

she described her assailant's clothing and gave a physical description of a Negro male around twenty years old, having dark brown skin, wearing a bush haircut and a little taller than herself in height (Tr. 5-41).

Appellant focuses on the discrepancy between Mrs. Scott's description of the intruder as being small and a little taller then herself.[14] Since Melvin Buchanan testified that he estimated appellant's height to be 5'8" or 5'9" (Tr. 173), if these three comparative figures are viewed most favorably to the Government, the difference appears only to be a few inches. More significantly, Mrs. Scott's testimony clearly indicates that she was only estimating his height, and the close correlation between the remainder of her description of appellant renders the actual difference in height of little magnitude. *United States* v. *Kemper*, D.C. Cir. No. 22,558, decided July 10, 1970, slip op. at 10 n.29.

Appellant further argues that Mrs. Scott's testimony at the preliminary hearing that the shirt worn by the attacker was a sweater or a T-shirt is additional evidence of a lack of independent source. While the transcript of the preliminary hearing was not in evidence, nevertheless we maintain that Mrs. Scott satisfactorily explained the alleged discrepancy (Tr. 26, 111). In any event, this disparity was ably argued to the trial court, which, it is well settled, is in a far better position than an appellate court to determine its probative value. *Cf. Clemons* v. *United States*, 133 U.S. App. D.C. 27, 38, 408 F.2d 1230, 1241 (1968) *(en banc)*, *cert. denied*, 394 U.S. 964 (1969).

The trial court's finding of an independent source can be reversed only if "clearly erroneous." *(Anthony) Long* v. *United States*, 137 U.S. App. D.C. 311, 424 F.2d 799 (1969). In seeking to having this finding reversed appellant shoulders a heavy burden. *United States* v. *(Clinton) Long*, 137 U.S. App. D.C. 275, 278, 422 F.2d 712,

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[14] Appellant testified that he was 6'2" tall (Tr. 80). Compare footnote 7, *supra*.

715 (1970). On the instant record, which copiously demonstrates Mrs. Scott's ample opportunity to observe her attacker and her instantaneous recognition of him as someone in whose company she had been for several hours earlier that same evening, such a burden is impossible for appellant to sustain. *Cf. United States* v. *Green*, D.C. Cir. No. 22,710, decided November 12, 1970.

II. The testimony of the prosecutrix was abundantly corroborated as to the identity of appellant.

(Tr. 10, 13, 19, 21-22, 36-37, 77-82, 119, 125, 149, 307)

Appellant's sole contention with respect to the sufficiency of the offenses is that the evidence identifying him as the perpetrator of the offenses to which he was charged was insufficient to warrant its submission to the jury.[15]

It is well established in this jurisdiction that for a conviction of a sex offense the testimony of the victim must be corroborated both as to the *corpus delicti*[16] and as to the identity of the accused. *Jenkins* v. *United States*, D.C. Cir. No. 23,337, decided August 12, 1970; *Franklin* v. *United States*, 117 U.S. App. D.C. 331, 330 F.2d 205 (1964); *Kidwell* v. *United States*, 38 App.

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[15] We shall direct our argument here to the sufficiency of the identification of appellant as the perpetrator of the assault with intent to commit rape, inasmuch as the burglary and robbery offenses do not require corroboration of the complainant's testimony. *Jones* v. *United States*, 124 U.S. App. D.C. 83, 361 F.2d 537 (1966); *Wigfall* v. *United States*, 97 U.S. App. D.C. 252, 230 F.2d 220 (1956); *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951).

[16] Although appellant does not contest the sufficiency of the government's proof as to the elements of the offense, we would point out that Mrs. Scott's prompt report to her nephew and to the police, her distraught emotional condition, the torn slip and the stretched stocking constituted sufficient corroboration of the *corpus delicti* to warrant submission of the case to the jury. *See Bryant* v. *United States*, 137 U.S. App. D.C. 124, 420 F.2d 1327 (1969); *Borum* v. *United States*, 133 U.S. App. D.C. 147, 409 F.2d 433 (1967), *cert. denied*, 395 U.S. 916 (1969).

D.C. 556 (1912). However, "the standard by which to determine the adequacy of identifying evidence is not as stringent as is required for proof of the offense itself," *United States* v. *Jenkins, supra,* slip op. at 3, since the "danger of an erroneous identification in a rape case is not of the same magnitude as the danger of a fabricated rape." [17] *Thomas* v. *United States,* 128 U.S. App. D.C. 233, 234, 387 F.2d 191, 192 (1967), quoting from *Franklin* v. *United States, supra,* 117 U.S. App. D.C. at 334-335, 330 F.2d at 208-209; *accord, United States* v. *Jenkins, supra; United States* v. *Terry, supra* note 17. Indeed, "the need for corroboration depends on the danger of falsification." *Thomas* v. *United States, supra,* 128 U.S. App. D.C. at 234, 387 F.2d at 192.

There was ample evidence adduced in the instant case to identify appellant as the assailant. Mrs. Scott's testimony revealed that she had more than adequate opportunity to observe appellant both before and after the attack. Earlier in the evening on the date of the offense she had spent over three hours at a small party at which appellant was present (Tr. 77, 149).[18] The lighting conditions at this party were normal (Tr. 19). Appellant danced twice with Mrs. Scott at the party, and they both engaged in conversation (Tr. 10, 307). Upon returning to her apartment and hearing a knock on her door, she looked out her window on two different occasions and saw a man wearing the same clothes which appellant wore at the party (Tr. 21-22, 82). She observed the face of her attacker illuminated by a nearby lamp, both before and after he removed his thin stocking mask, and she recognized him immediately as appellant (Tr. 79, 119). He addressed her by her first name (Tr. 79). The intruder also was wearing the same clothing appellant wore earlier at the party (Tr. 78, 81). She promptly

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[17] This principle applies to any sex offense. *United States* v. *Terry,* 137 U.S. App. D.C. 267, 422 F.2d 704 (1970).

[18] Mrs. Scott thought she might have met appellant at a party some months previous to this offense (Tr. 125).

called her nephew and described her assailant as "that boy" at the party with the "bush" (Tr. 22, 36-37, 80). Mrs. Scott identified appellant as the assailant upon his arrest later that morning (Tr. 13), and at trial she unhesitatingly identified appellant as the man who attacked her (Tr. 81).[19] Mrs. Scott's testimony was amply corroborated by her nephew, who testified that appellant, the only person at the party with a bush haircut, left wearing a gold shirt and dark pants and stated that he was going to visit Mrs. Scott. Appellant was also seen at Mrs. Scott's apartment door by a neighbor who became annoyed at appellant's loud knocking. Most important, appellant's fingerprints were found on a box of film in Mrs. Scott's apartment. This, we submit, was sufficient corroboration to render insubstantial any discrepancy between appellant's height as stated by himself and the estimations of appellant's height given by Mrs. Scott and Melvin Buchanan in their testimony. The failure to find any of appellant's head hairs in the stocking was satisfactorily explained upon cross-examination by the Government of the defense expert witness. The lighting conditions available to Mrs. Scott at the party and later at her apartment were considerably better than those available to victims in recent sex cases where this Court has found adequate opportunity to observe. *Jenkins* v. *United States, supra; Carter* v. *United States*, —— U.S. App. D.C. ——, 427 F.2d 619 (1970); *Calhoun* v. *United States*, 130 U.S. App. D.C. 266, 399 F.2d 999 (1968).

We submit, therefore, that viewed in the light most favorable to the Government,[20] the evidence in the case

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[19] Although we cannot rely on the pre-trial identification testimony to corroborate the identification testimony which the jury actually heard, this Court may nevertheless consider it as tending to support the accuracy and reliability of the in-court identification. *See Hawkins* v. *United States*, 137 U.S. App. D.C. 103, 420 F.2d 1306 (1969).

[20] *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

at bar was more than sufficient on the issue of identity to warrant its submission to the jury.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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